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7 ZINUS, INC.

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

10 ZINUS, INC., a California corporation,

11 Plaintiff,
12 v.

13 SIMMONS BEDDING COMPANY, a
14 Delaware corporation, and DREAMWELL,
LTD., a limited liability company of
15 Nevada,

16 Defendants.

17 DREAMWELL, LTD., a limited liability
company of Nevada,

18 Counterclaimant,
19 v.

20 ZINUS, INC., a California corporation,

21 Counterdefendant.

Case No. 07-CV-03012 PVT

**DECLARATION OF SCOTT
REEVES IN SUPPORT OF
ZINUS, INC.'S MOTION FOR
SUMMARY JUDGMENT OF
NON-INFRINGEMENT DUE TO
NO DIRECT INFRINGEMENT**

1 I, Scott Reeves, declare:

2 1. My name is Scott Reeves. I am the President of plaintiff and counterdefendant
3 ZINUS, INC. ("Zinus"). I have personal knowledge of the matters set forth herein and, if
4 called upon to testify, could competently testify thereto.

5 2. Zinus has shipped thousands of units of a product called the "Mattress-in-a-
6 Box" product to Wal-Mart Stores, Inc. ("Wal-Mart"). There are two types of the
7 "Mattress-in-a-Box" product as that term is used in this declaration: 1) a product
8 referred to in this declaration as the "Duffel Bag Mattress-in-a-Box" product, and 2) a
9 product referred to in this declaration as the "Swirl Wrap Mattress-in-a-Box" product.

10 3. In the making of a unit of the "Duffel Bag Mattress-in-a-Box" product, a
11 mattress is compressed. The compressed mattress is then rolled into a rolled shape and
12 placed into a duffel bag. The rolled mattress in the duffel bag has a cylindrical shape.
13 The resulting rolled mattress and duffel bag assembly is then placed into a cardboard
14 shipping box to make the "Duffel Bag Mattress-in-a-Box" product. The cardboard
15 shipping box is taped closed so that it contains the mattress and duffel bag assembly.
16 The resulting "Duffel Bag Mattress-in-a-Box" product is then shipped to Wal-Mart in a
17 condition in which the mattress is in the duffel bag, and in which the mattress and
18 duffel bag assembly is sealed inside the cardboard shipping box. All units of this
19 "Duffel Bag Mattress-in-a-Box" product that have ever been shipped or otherwise
20 supplied to Wal-Mart are referred to in this declaration as the "shipped units" of
21 "Duffel Bag Mattress-in-a-Box" product.

22 4. At no time has Zinus ever opened any of the cardboard shipping boxes of
23 any of the "shipped units" of the "Duffel Bag Mattress-in-a-Box" product. At no time
24 has Zinus ever "removed" the mattress of even a single "shipped unit" of the "Duffel
25 Bag Mattress-in-a-Box" product from its duffel bag or from any other structure. At no
26 time has Zinus ever caused the mattress of even a single "shipped unit" of the "Duffel
27 Bag Mattress-in-a-Box" to return to an uncompressed state. Zinus simply supplies the
28 "shipped units" of the "Duffel Bag Mattress-in-a-Box" product to Wal-Mart, where the

1 compressed mattresses contained in the shipping boxes have never been removed by
2 Zinus from the shipping boxes, and wherein the compressed mattresses have never been
3 allowed by Zinus to return to an uncompressed state.

4 5. In the making of the “Swirl Wrap Mattress-in-a-Box” product, a mattress is
5 compressed and placed on a sheet of flexible film. The compressed mattress and the
6 flexible film are then rolled up together to form a cylindrical rolled-up mattress
7 assembly. The cylindrical rolled-up mattress assembly is then held in place by
8 applying either tape or ribbon-shaped strips of durable plastic stripping to the
9 cylindrical roll. The cylindrical rolled-up mattress assembly is never placed into any
10 duffel bag or into any containment sleeve. The taped or banded cylindrical rolled-up
11 mattress assembly is then placed into a cardboard shipping box to make the “Swirl
12 Wrap Mattress-in-a-Box” product. The cardboard shipping box is taped closed. The
13 resulting “Swirl Wrap Mattress-in-a-Box” product, where the mattress is in a
14 compressed state in the sealed cardboard shipping box, is then shipped or otherwise
15 supplied to Wal-Mart. All units of this “Swirl Wrap Mattress-in-a-Box” product that
16 have ever been shipped or otherwise supplied to Wal-Mart are referred to in this
17 declaration as the “shipped units” of “Swirl Wrap Mattress-in-a-Box” product.

18 6. At no time has Zinus ever opened any of the cardboard shipping boxes of the
19 “shipped units” of the “Swirl Wrap Mattress-in-a-Box” product. At no time has Zinus
20 removed the tape or plastic stripping from the mattress of even a single “shipped unit”
21 of the “Swirl Wrap Mattress-in-a-Box” product. At no time has Zinus caused or
22 allowed the mattress of even a single “shipped unit” of the “Swirl Wrap Mattress-in-a-
23 Box” to return to an uncompressed state. Zinus simply supplies the “shipped units” of
24 the “Swirl Wrap Mattress-in-a-Box” product to Wal-Mart, where the compressed
25 mattresses of the “shipped units” are sealed in their shipping box, and where the
26 compressed mattresses of the “shipped units” have never been allowed by Zinus to
27 return to an uncompressed state.

1 7. At no time in the supplying or sale to Wal-Mart of any of the “shipped units”
2 of the “Mattress-in-a-Box” product (either Duffel Bag or Swirl Wrap) has Zinus ever:
3 1) removed (in any fashion) the compressed mattress of the “shipped unit” from its
4 shipping box, or from any other structure, or 2) allowed the mattress of the “shipped
5 unit” to return to an uncompressed state.

6 8. I have had many hours of discussions with Wal-Mart about the Mattress-in-
7 a-Box product, and more particularly about how the Mattress-in-a-Box product is
8 received by Wal-Mart, displayed to customers by Wal-Mart at Wal-Mart stores, and
9 ultimately sold to Wal-Mart’s retail customers. On information and belief, Wal-Mart
10 has never “evacuated air” from any structure, thereby causing any mattress of any
11 “shipped unit” of any Mattress-in-a-Box product (Duffel Bag or Swirl Wrap) to
12 compress. On information and belief, Wal-Mart has never compressed any mattress of
13 any “shipped unit” in any fashion whatsoever. On information and belief, Wal-Mart
14 has never placed a compressed mattress from any “shipped unit” of any Mattress-in-a-
15 Box product in any containment sleeve or into any duffel bag.

16 9. In my opinion, it would be absurd to maintain that Wal-Mart has obtained a
17 mattress of a “shipped unit” of Zinus’ Mattress-in-a-Box product, decompressed the
18 mattress, then inserted the decompressed mattress into a tube of deformable material,
19 and then “evacuated air” from the tube thereby causing the mattress to compress again,
20 and then inserted the evacuated tube into a containment sleeve for shipment, and then
21 removed the evacuated tube from the containment sleeve, and then allowed the mattress
22 to return to an uncompressed state. In my opinion, Wal-Mart would have had no
23 reason to do that, and has in fact not done so. On information and belief, Wal-Mart
24 simply receives the “shipped units” of the Mattress-in-a-Box product from Zinus, and
25 then maintains those “shipped units” in their original shipping boxes as the boxes have
26 been supplied to Wal-Mart by Zinus. On information and belief, all “shipped units” of
27 the Mattress-in-a-Box product that have been sold by Wal-Mart to customers have been
28 sold in their original shipping boxes where the shipping boxes have been sealed by

1 Zinus prior to shipment to Wal-Mart and have never been opened by Wal-Mart.

2 10. In my opinion, it would be absurd to maintain that any retail customer who
3 purchased a “shipped unit” of the Mattress-in-a-Box product ever decompressed the
4 mattress of the “shipped unit”, then inserted the decompressed mattress into a tube of
5 deformable material, then “evacuated air” from the tube thereby causing the mattress to
6 compress again, then inserted the evacuated tube into a containment sleeve for
7 shipment, then removed the evacuated tube from the containment sleeve, and then
8 allowed the mattress to return to an uncompressed state. In my opinion, Wal-Mart's
9 retail customers would have had no reason to do that, and have in fact not done so. On
10 information and belief, no retail customer who has purchased a “shipped unit” of the
11 Mattress-in-a-Box product has ever “evacuated air” from any structure, thereby causing
12 a mattress in the structure to decompress.

13 11. On information and belief, no party other than Zinus has ever compressed
14 (by any mechanism) the mattress of any of the “shipped units” of the Mattress-in-a-Box
15 product referred to in this declaration. On information and belief, no party other than
16 Zinus has ever caused air to be removed or evacuated (by any mechanism) from any
17 clear plastic wrapper containing any mattress of any of the “shipped units” of the
18 Mattress-in-a-Box product referred to in this declaration.

19 12. Limited user instructions in schematic form were and are printed on the
20 outside of the shipping boxes of shipped units of the “Mattress-in-a-Box” product.
21 Attached hereto as Exhibits A, B, C and D are copies of photographs of the outside of a
22 shipping box of the Duffel Bag Mattress-in-a-Box product showing these schematic
23 instructions. In addition, an instruction sheet was provided inside the box. Attached
24 hereto as Exhibit E is a copy of the instruction sheet. Attached hereto as Exhibits F, G1
25 and G2 are copies of photographs of the outside of a shipping box of the Swirl Wrap
26 Mattress-in-a-Box product showing the schematic instructions.

27 13. Other than the instructions such as those of Exhibits A-G, Zinus has
28 provided no instructions or directives to Wal-Mart or to Wal-Mart's customers
DECLARATION OF SCOTT REEVES IN
SUPPORT OF ZINUS, INC.'S MOTION FOR
SUMMARY JUDGMENT OF NON-INFRINGEMENT
MENT DUE TO NO DIRECT INFRINGEMENT

1 regarding how to remove a mattress from the shipping box of a Mattress-in-a-Box
 2 product so as to cause the mattress to “gradually” expand to an uncompressed state.
 3 Although I do not understand what “gradually returns to an uncompressed state” means
 4 in the context of the claims of the ‘142 Patent, I know that gradually does not mean
 5 allowing the mattress to expand as fast as it can. It was never my or Zinus’ intent for
 6 the compressed mattress to be removed from the clear plastic wrapper in such a way
 7 that the compressed mattress gradually returns to an uncompressed state. We intended
 8 for the end customer of the Mattress-in-a-Box product to be able to sleep on the
 9 mattress as soon as possible after removing the compressed mattress from the shipping
 10 box.

11 RELATIONSHIP BETWEEN ZINUS AND WAL-MART:

12 14. The relationship between Zinus and Wal-Mart regarding the “shipped
 13 units” of the Mattress-in-a-Box product is an ordinary arms-length commercial sales
 14 relationship between two independent companies. The arms-length relationship does
 15 not concern the issue of opening any “shipped unit” of the Mattress-in-a-Box product
 16 and does not concern causing any mattress to return to an uncompressed state.

17 15. Zinus and Wal-Mart have never had and do not now have any contract or
 18 agreement that concerns the issue of removing the mattress of any “shipped unit” of a
 19 Mattress-in-a-Box product from its shipping box, and returning the mattress to an
 20 uncompressed state.

21 16. Zinus did not control and does not now control what Wal-Mart did or does
 22 with any “shipped unit” of the Mattress-in-a-Box product.

23 17. Zinus has never directed, and does not now direct, Wal-Mart to do anything
 24 with respect to the “shipped units” of the Mattress-in-a-Box product.

25 18. Wal-Mart never acted as an agent of Zinus when Wal-Mart purchased
 26 and/or sold any shipped units of the Mattress-in-a-Box product.

27 19. Wal-Mart has not and does not now act on behalf of Zinus, or for Zinus, in
 28 any fashion.

1 RELATIONSHIP BETWEEN ZINUS AND WAL-MART'S CUSTOMERS:

2 20. Wal-Mart's retail customers who have purchased the "shipped units" of the
3 Mattress-in-a-Box product from Wal-Mart have never acted as agents of Zinus and are
4 not now acting as agents of Zinus. Wal-Mart's retail customers do not report to Zinus
5 and are not obligated to Zinus in any way.

6 21. Wal-Mart's retail customers have not and do not now act on behalf of Zinus
7 in any fashion.

8 22. Zinus never has controlled what Wal-Mart's retail customers do with the
9 "shipped units" of the Mattress-in-a-Box product.

10 23. Zinus and Wal-Mart's retail customers who have purchased "shipped units"
11 of the Mattress-in-a-Box product from Wal-Mart have never had any contractual
12 relationship with Zinus other than a manufacturer's warranty.

13 24. On information and belief, Wal-Mart's retail customers purchase the
14 "shipped units" of the Mattress-in-a-Box product from Wal-Mart in ordinary arms-
15 length retail sales transactions.

16
17 I declare under penalty of perjury under the laws of the United States of America that
18 the forgoing is true and correct.

19 Executed this 14th day of January 2008 in Pleasanton, California.

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Scott Reeves
President
Zinus, Inc.